KELUARGA COMMUNICATION SDN BHD A

v.

NORMALA SAMSUDIN & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA B
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NOS: W-02-386-1999 & W-02-385-1999]
3 JANUARY 2006 C

TORT: *Defamation - Libel - Libel in article - Whether statements defamatory - Article to be considered as a whole - Objective test to be used - Whether there was full and frank withdrawal of defamatory suggestions* D

TORT: *Damages - Assessment - Aggravated damages - Whether defence of justification pleaded - Whether untruth of matter complained of to be considered in awarding aggravated damages*

The defendant (publisher of a magazine known as "Mingguan E
Wanita") had caused to be published four issues of Mingguan Wanita, more particularly issues No. 623, 636, 642 and 644 wherein appeared articles concerning the plaintiff (a broadcast journalist). Sometime in September 1995, the defendant's reporter F
(DW1) had interviewed the plaintiff *via* telephone. Based on this interview, the defendant published an article in the first magazine (issue No. 623). The defendant then published the second magazine (issue 636) which carried the plaintiff's photographs and on the front cover the words "Mala Tebus Talak RM3 Juta?" and within the magazine under the heading "Heartache of the person G
Normala, Her heart says Yes, Her lips says no!", an article which *inter alia* mentioned a third person in her married life and the payment of RM3 million to her husband to release her from her marriage bond. Upon reading the article in the second magazine the plaintiff contacted DW1 and asked him to put right the H
incorrect matters published about her and to apologize for the same. The defendant published the third magazine (issue 642) which purported to comply with the plaintiff's request. The plaintiff was not satisfied that the article in the third magazine had put matters right. The defendant then published the fourth I
magazine (issue 644) which purported to explain the truth and to apologize.

A The plaintiff sued the defendant alleging that the publication of issue No. 636 was defamatory of her. Plaintiff claimed that the article, *inter alia*, bore the inferences that a third person in the plaintiff's life had paid RM3 million to the plaintiff's ex-husband to buy her off from her marriage bond, that she was an immoral B person and that she had had extra-marital affairs. The defendant claimed that the words on the cover were phrased as a question and not a statement. The defendant denied writing and publishing the article with false and malicious intent and said that they had tendered an apology. The learned judge found that the caption C and words complained of had libeled the plaintiff and awarded her general damages in the sum of RM100,000, aggravated damages in the sum of RM100,000, interests and costs. The defendant appealed against the finding and against the award of aggravated damages. The plaintiff cross appealed against what she considered D as inadequacy of the damages awarded.

Held (allowing the defendant's appeal with costs and dismissing the plaintiff's cross appeal)
Per Zulkefli Makinudin JCA:

E **(1)** The test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in which it must be given a meaning a reasonable man would understand and for that purpose, that is, in considering whether the words complained of contained any defamatory imputations, it is F necessary to consider the whole article. (para 16)

(2) Had the learned trial judge taken into account the entirety of the article, he could not possibly have concluded that the words complained of imputed that the plaintiff was a loose-G charactered woman with lax morals. The learned trial judge had erred when he concluded that the words complained of imputed adultery, unchastity or immoral behaviour on the part of the plaintiff. (para 24)

H **(3)** The apology that appeared in issue No. 644 of the magazine met the criteria of a full and frank withdrawal of the charges or suggestions conveyed if any regarding the plaintiff. Further, the apology should be regarded as adequate noting that there are expressions of regret by the defendant that such charges I or suggestions were ever published. (para 36)

(4) The defendant had never depicted the matter complained of to be true. The defendant in its statement of defence had never taken a plea of justification to the matters complained of. Both in the defendant's own evidence-in-chief and in the cross-examination of the witnesses for the plaintiff, it was never suggested that there was any truth to the matter complained of. The untruth of the matter complained of ought not to have been a matter to be considered for the matter of aggravated damages. (para 37)

Bahasa Malaysia *translation of headnotes*

Defendan (penerbit sebuah majalah yang dipanggil "Mingguan Wanita") telah menerbitkan empat keluaran Mingguan Wanita, iaitu isu-isu No. 623, 636, 642 and 644, yang menyiarkan artikel-artikel mengenai plaintif (seorang wartawan penyiaran). Pada bulan September 1995, wartawan defendan, DW1, telah menemuramah plaintif melalui telefon. Berdasarkan temuramah tersebut, defendan telah menyiarkan satu artikel dalam majalah pertama (keluaran 623). Defendan kemudian menerbitkan majalah kedua (isu 636) dan mempamerkan gambar-gambar plaintif di muka depannya dengan tajuk "Mala Tebus Talak RM3 Juta?", sementara di muka dalamnya disiarkan tajuk "Heartache of the person Normala, Her heart says Yes, Her lips says no!". Artikel itu juga menyebut tentang kewujudan orang ketiga dalam kehidupan rumah tangganya dan pembayaran RM3 juta kepada suaminya untuk melepaskan beliau dari ikatan perkahwinan. Apabila terbaca artikel di dalam majalah kedua, plaintif menghubungi DW1 dan meminta DW1 memperbetulkan perkara tidak benar yang tersiar mengenai dirinya serta memohon maaf kepadanya. Defendan kemudian menerbitkan majalah ketiga (isu 642) bagi memenuhi permintaan plaintif. Bagaimanapun, plaintif tidak berpuashati bahawa artikel dalam majalah ketiga telah memperbetulkan keadaan. Berikutnya, defendan menerbitkan majalah keempat (isu 644) bertujuan menjelaskan perkara sebenar dan memohon maaf.

Plaintif memfail tuntutan dengan menyatakan bahawa penerbitan Mingguan Wanita No. 636 telah memfitnahnya. Menurut plaintif, artikel tersebut, antara lain, mengandungi inferens bahawa terdapat orang ketiga dalam kehidupan plaintif yang telah membayar RM3 juta kepada bekas suami plaintif bagi membeli pembebasan plaintif dari ikatan perkahwinan, bahawa plaintif adalah seorang yang tidak bermoral dan bahawa beliau juga telah menjalin hubungan asmara di luar perkahwinannya. Defendan mengatakan bahawa perkataan-

perkataan pada muka depan disiar dalam bentuk soalan dan bukannya satu kenyataan. Defendan menyangkal bahawa ia menulis dan menyiarkan artikel dengan niat serong atau jahat dan menegaskan bahawa ia sudah pun memohon maaf. Yang arif hakim mendapati bahawa kenyataan dan perkataan yang dibantah telah memfitnah plaintif dan mengawardkan gantirugi am sebanyak RM100,000, gantirugi teruk sebanyak RM100,000, faedah dan kos. Defendan merayu terhadap award gantirugi teruk. Plaintiff merayu balas terhadap jumlah gantirugi yang dianggapnya sebagai tidak mencukupi.

Diputuskan (membenarkan rayuan defendan dengan kos dan menolak rayuan balas plaintif)
Oleh Zulkefli Makinudin HMR:

(1) Ujian yang harus dipakai dalam mempertimbang sama ada sesuatu kenyataan itu telah memfitnah adalah satu ujian objektif. Ertinya, ia harus diberikan maksud yang difahami oleh seorang yang munasabah, dan untuk tujuan itu, iaitu menentukan sama ada perkataan yang dibantahi mengandung unsur-unsur fitnah, adalah perlu untuk mempertimbang keseluruhan artikel.

(2) Sekiranya yang arif hakim mempertimbang keseluruhan artikel, beliau tidak mungkin mencapai konklusi bahawa perkataan yang dibantahi itu merujuk kepada plaintif sebagai seorang yang berkelakuan tidak senonoh dan bermoral rendah. Yang arif hakim telah khilaf apabila merumuskan bahawa perkataan yang dibantahi menunjukkan bahawa plaintif telah berzina, tidak suci atau berkelakuan secara yang tak bermoral.

(3) Permohonan maaf yang tersiar di dalam keluaran No. 644 majalah memenuhi kriteria suatu penarikan balik yang ikhlas dan menyeluruh akan pengataan-pengataan dan gambaran-gambaran yang berbangkit terhadap plaintif, jika ada. Selain itu, permohonan maaf tersebut harus dianggap sebagai mencukupi mengambil kira bahawa terdapat ekspresi kekesalan oleh defendan atas penyiaran pengataan atau dakwaan-dakwaan berkenaan.

(4) Defendan tidak memaparkan apa yang disungutkan di sini sebagai benar. Dalam Penyata Pembelaannya, defendan langsung tidak memplidkan justifikasi terhadap perkara yang disungutkan. Juga, sama ada semasa defendan memberi keterangan utama mahupun semasa pemeriksaan balas saksi-

saksi plaintif, tiada dakwaan dibuat bahawa apa yang disungutkan itu benar. Ketidakbenaran perkara yang disungutkan tidak harus menjadi satu pertimbangan bagi gantirugi teruk.

Case(s) referred to:
Charleston v. News Group Newspapers Ltd [1995] 2 AC 65 ***(refd)***

Other source(s) referred to:
Gatley on Libel & Slander, 10th edn, pp 108, 110, 243, 244
Prof Ahmad Mohamed Ibrahim, *The Administration of Islamic Law in Malaysia,* pp 256-259

For the appellant - Haris Ibrahim (Sanil Lopez with him); M/s Haris & Co
For the respondent - C Leo Cameon; M/s C Leo Cameons

Reported by Amutha Suppayah

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] The plaintiff sued the defendant for defamation. The Court gave judgment for the plaintiff against the defendant. The learned trial judge found the caption and words complained of and comprised in the article published by the defendant in a magazine known as "Mingguan Wanita" had libeled the plaintiff and awarded the plaintiff general damages in the sum of RM100,000, aggravated damages in the sum of RM100,000, interests and costs.

[2] The defendant now appeals against the finding of the learned trial judge that the defendant had defamed the plaintiff. Alternatively the defendant appeals against the award of aggravated damages. The plaintiff has cross appealed against what she considered as inadequacy of the damages awarded.

[3] In this judgment a reference to the record of appeal would refer to the record of appeal (vol. 1) filed by the defendant for its appeal in Civil Appeal No. W-02-386-1999.

Facts Of The Case

[4] The relevant facts of the case are as follows:

The defendant is the publisher of a magazine known as "Mingguan Wanita". The defendant had caused to be published four issues of Mingguan Wanita, more particularly issues No. 623, 636, 642 and 644 wherein appeared articles of and concerning the plaintiff. The plaintiff had been with TV3 since 1991 and had been its presenter cum newscaster and had been hosting several TV programmes and was also a broadcast journalist. Some time in September 1995, the defendant's reporter for Mingguan Wanita, one Anwar bin Razali (DW1) interviewed the plaintiff *via* the telephone. At the said interview the plaintiff claimed she declined to talk about her private life and never made any comment about any second or third person in her married life let alone say anything about "Tebus Talak RM3 Juta". Based on this interview the defendant published an article in the first magazine (issue No. 623) which is not the subject of this action. Some time in December 1995 when the plaintiff hosted the TV3 programme known as "Nona" several reporters including the said reporter (DW1) interviewed her but nothing was mentioned about a third person in her life and "Tebus Talak RM3 Juta". However, the defendant published the second magazine (issue 636) which carried the plaintiff's photographs and on the front cover the words "Mala Tebus Talak RM3 Juta?" and within the magazine under the heading "Heartache of the person Normala, Her heart says Yes, Her lips says no!" (as translated) an article which *inter alia* mentioned a third person in her married life and the payment of RM3 million to her husband to release her from her marriage bond. Upon reading the article in the second magazine the plaintiff contacted the reporter DW1 and asked him to put right the incorrect matters published about her and to apologize for the same. The defendant published the third magazine (issue 642) which purports to comply with the plaintiff's request. The plaintiff was not satisfied that the article in the third magazine had put matters right. Her dissatisfaction was conveyed through one Anis, who was not called as a witness. The defendant then published the fourth magazine (issue 644) which purports to explain the truth and to apologize.

The Plaintiff's Claim

The plaintiff's action arises from, and is based on the defendant's publication in the said Mingguan Wanita of January 26-2 February 1996 issue (issue No. 636) wherein the front cover portrays a photograph of the plaintiff with the words "Mala Tebus Talak RM3 Juta?" and within the magazine, photographs of the plaintiff

and an article under the heading "Jiwa lara seorang Normala, Hatinya berkata iya, bibirnya berkata tidak!" which the plaintiff alleges is defamatory of her and is understood to bear the meanings and inferences that:

(i) The plaintiff bought herself off from her marriage bond by paying (her ex-husband) the sum of RM3 million.

(ii) There is a third person in the plaintiff's marriage.

(iii) The plaintiff attempted to deny the aforesaid by attributing the same as an ordinary occurrence.

(iv) The plaintiff is not forthright.

(v) The third person in the plaintiff's life had paid the RM3 million to the plaintiff's husband.

(vi) The plaintiff is an immoral person.

(vii) The plaintiff's divorce is the result of her extra-marital affairs.

(viii) The plaintiff is selfish and/or self-centred and/or mercenary.

(ix) The plaintiff does not care for the welfare and happiness of her children.

[6] A full version of the said article published in Bahasa Malaysia reads as follows:

> Benarkah pengacara popular TV3 Normala Samsudin sudah berpisah dengan suaminya, Ruslan?
>
> Akhirnya berita itu sahih. Sah. Mala sudah berpisah dengan suaminya.
>
> Persoalan ini bermain di hati sesiapa sahaja yang meminati wanita glamour ini. Saya terus terfikir sendiri betapa kehidupan berumahtangga sebenarnya satu perjudian.
>
> Bukan ingin mengungkit kembali apa yang telah ditakdirkan buat keduanya namun sebagai salah seorang pengagum pengacara jelita ini, saya merasakan tempiasnya. Mengapa saya harus berperasaan begitu?
>
> Agaknya inilah salah satu keberuntungan menjadi wartawan. Banyak cerita yang tidak disangka-sangka mendatang. Tidak cukup dengan panggilan telefon, cerita teman-teman menambah kesahihan.
>
> Seperti juga cerita kononnya ada orang ketiga dalam rumah tangganya. Ini memaksa saya segera menghubunginya. Seperti yang dijangkakan Normala sedaya upaya menafikan dan mengatakan semua itu adalah perkara biasa.

A ''Mala tidak nafikan pernah menerima beberapa panggilan telefon daripada pihak-pihak tertentu. Mala anggap semua itu hanyalah asam garam yang perlu ditempuh oleh seseorang yang kerjayanya melibatkan umum.'

'Tergoda? Tidaklah. Mala yakin Mala masih kuat menghadapi
B semua itu. Dalam keadaan begitu Mala berpegang pada sikap diri kita sendiri. Kalau berjuta dugaan datang dan dalam waktu yang sama kita bertambah tabah, Mala rasa dugaan begitu akan hilang juga', kata Normala dengan mesranya.

Daripada penerangannya itu dapat dirasakan dia sedaya upaya cuba
C mengelak daripada membicara soal rumah tangganya. Sehinggakan apabila saya meminta merakamkan pengakuan cintanya bersama suaminya, Ruslan Hussain, First Officer Pilot MAS untuk ruangan MEMORI CINTA, Normala dengan lembut menolak. Alasannya tidak mahu menyinggung mana-mana pihak. Pun begitu apabila
D saya bertanya bagaimanakah penerimaan suaminya, Mala menjawab: 'Dia faham dan tahu situasi yang terpaksa Mala hadapi. Bukan dia tidak kisah tetapi dia banyak menasihati Mala agar lebih berwaspada.'

'Suami nasihati Mala supaya jangan terlalu menonjol dikhalayak
E ramai kecuali sewaktu bertugas. Mala sendiripun selalu menyakinkan dia. Suami Mala faham dan sentiasa memberi dorongan.' Begitulah pendirian Normala. Rumah tangga adalah keutamaan walaupun bidang penyiaran tetap diteruskan. 'Hidup berumah tangga memerlukan tolak ansur. Suami jangan asyik fikirkan diri sendiri. Hati isteri mesti difahami dan dijaga.' 'Isteri
F juga seperti orang lain yang mempunyai citarasa dan minat. Ada suami yang melarang isterinya menonjol di televisyen sedangkan bidang itu minat si isteri ...' Tambah Normala melahirkan pandangannya. Saya tertanya sendiri apakah ada cerita di sebalik pandangannya itu. Apakah Normala ingin melepas rasa hati?
G Sehinggalah saya mendapat panggilan telefon daripada seseorang yang mengelar dirinya sebagai peminat Normala memberitahu kononnya rumah tangga Normala semakin genting. Lebih menarik kononnya ada orang ketiga dalam hidup Normala telah sudi membayar wang tebus talak sebanyak RM3 juta kepada suaminya. Tecenggang saya seketika sehinggalah saya mendengar sendiri
H daripada seorang teman yang kononnya suaminya telah berkahwin baru.

Normala terkilan kerana dalam kemelut dia menepis godaan luar, kesetiaannya telah dipersiakan.

I Alasannya cukup mudah. Suaminya mahu seorang isteri sepenuh masa menguruskan rumah tangga.

Begitulah hidup ini. Saya bertemu lagi dengan Normala sewaktu rancangan Pengacara Jemputan Nona Disember lalu dan dalam kesibukan majlis sempat saya bertanyakan kebenaran cerita-cerita tersebut.

Sikap Normala yang lemah-lembut dengan senyuman manis di bibir membuatkan saya terfikir: Betapa tabahnya wanita ini. Lagaknya seolah tiada apa yang berlaku. Dia tetap tenang dan ceria. Namun hatinya siapalah yang tahu ...

'Kita tidak dapat menghalang orang lain daripada memperkatakan hal diri kita terutama seorang celebriti seperti Mala. Terpulanglah apa orang ingin katakan. Apa yang dapat Mala katakan, Mala bahagia dengan hidup Mala sekarang!' jawab Normala bersahaja sambil mempersilakan saya menjamah hidangan yang tersedia.

Walau apapun cerita tentang Normala Samsuddin selepas ini, tidaklah saya hiraukan sangat. Cuma saya tiba-tiba jadi sayu apabila mengenangkan kedatangan Syawal ini Asraf, Ruhila dan Rubi tentunya akan kehilangan sesuatu. Kemeriahan Aidilfitri tahun lalu mungkinkah terulang kembali? MW.

[7] A translation of the said article as agreed by both the parties reads as follows:

IS IT TRUE that popular TV3 hostess Normala Samsudin is divorced from her husband, Ruslan?

Finally the news is confirmed. True. Mala is divorced from her husband.

This question plays on the mind of whoever is interested in this glamorous woman. I pondered to myself how married life is actually a gamble.

It was not my intention to dig up again what has been fated for the couple but as an admirer of this hostess, I was caught up in the mood of the moment. Why did I feel that way?

It appears that this is one of the advantages of being a journalist. Many unexpected stories crop up. As if the phone calls were not enough, stories from my friends lent further confirmation.

One such story is that there is a third person in her marriage. This made me quickly contact her. As I expected, Normala strenuously denied it and said such happenings were something normal.

'I do not deny having received several phone calls from particular people. I consider it all part of the ups and downs that have to be experienced by someone whose work involves the public.'

A 'Enticed? No. I am certain that I am strong enough to face it all. In such a situation I stay firm to my own attitude. If a million disappointments befall me and at the same time I am more determined, I feel the disappointments will go away,' said Normala sweetly. From here explanation I felt that she was clearly and with determination trying to avoid discussing matters involving her marriage. So much so that when I asked her to chronicle her romance with her husband Ruslan Hussain, a Pilot First Officer with MAS, for the (magazine's) MEMORI CINTA column, Normala gently declined. Her explanation was that she did not want to injure the feelings of anyone.

B

C So it was too when I asked what her husband thought of the situation, she answered: 'He understands and knows the situation that I am forced to face. It's not that he doesn't care but he advises me a lot to be more cautious.'

D 'My husband advises me not to project myself too much in the public eye except when working. I always reassure him (that I will not). My husband understands and always gives me encouragement.'

E That's Normala's stand. Her married life is her priority, although she continues in the broadcasting field. 'Married life requires compromise. Husbands must not always think of themselves. Their wives' wishes must be understood and heeded.'

F 'Wives like other people also have aspirations and interests. There are husbands who prevent their wives from appearing on television whereas that field is what interests the wives ...' added Normala in expressing her view.

G I asked myself whether there was another story behind her view. Did Normala want to express her true feelings? Then I received a phone call from someone who admitted being an admirer of Normala, who told me her marriage was in dire straits. More interestingly, apparently there was a third person in her life who was prepared to pay RM3 million to her husband as 'tebus talak' (compensation) to divorce her. I was stunned for a while and then I heard from a friend that apparently her husband had taken a new wife. Normala was disappointed because while she avoided

H temptations, her fidelity has been wasted. Her explanation was too simple. Her husband wanted a full-time housewife!

Such is this life. I met Normala again during the Nona Hostess Invitation show last December and in the hustle and bustle of the function I still managed to ask whether there was any truth in

I the stories.

Normala's gentle attitude and the sweet smile on her lips made me think: How strong this woman was. Her behaviour was as if nothing had happened. She was still calm and radiant. But who knew her inner feelings ...

'We cannot prevent people from saying things about us, especially a celebrity like me. It's up to them what they want to say. I can only say that I am happy with my life now!' Normala answered while inviting me to enjoy the food that had been laid out.

Whatever stories are told about Normala Samsudin after this, I shall not pay them too much attention. Only I suddenly became sad when I remembered that this approaching Syawal, Asraf, Rahila and Rubi surely would lose something. Will the joy of last year's Aidilfitri be repeated. MW

[See pp. 16-20 of the Record of Appeal].

The Defence

[8] The defendant in its defence *inter alia* admits publishing the said magazine with the main photograph of the plaintiff and avers that the words on the cover thereof are phrased as a question and not a statement. The defendant also admits writing and publishing the article and the photographs but denies doing so with false and malicious intent or that the article was understood to bear a false and malicious intent and further avers that the said article is a continuation of a previous article published in issue No. 623 dated 27 October - 3 November 1995 (the first magazine) which was based on a telephone interview between the plaintiff and the reporter, DW1.

[9] The defendant also denies that the said article in the second magazine in issue No. 636 (the subject of this action) in its ordinary meaning bears or was understood to bear or was capable of bearing any meaning defamatory of the plaintiff.

[10] Further the defendant avers that the plaintiff authorized and/or assented to and/or acquiesced in the publication of the said article.

[11] The defendant also alleges that by an oral agreement made on or about 9 February 1996 between the plaintiff and the reporter DW1 as the defendant's agent, it was agreed between the parties that as full satisfaction and discharge of her cause of action in respect of the said words and in consideration of the same the defendant would cause to be written, printed and published in a conspicuous position in its magazine, a subsequent

explanation of the plaintiff and of the interview mentioned in the said article and an apology to the plaintiff and her family, in the event the said publication by the defendant which mentioned the matter of "Tebus Talak RM3 Juta" had caused confusion and misunderstanding and a retraction of the same.

[12] The defendant maintained that pursuant to the said agreement, it had caused to be printed and published in a conspicuous position in the subsequent magazines (issues No. 642 and 644) an explanation and a denial by the plaintiff of the allegations contained in the article in the second magazine, and also an apology by the defendant for mentioning the matter of "Tebus Talak RM3 Juta".

[13] In the alternative the defendant denied that the article infers the meaning or is understood to bear the meaning or is capable of bearing the meaning as stated by the plaintiff.

The Meanings Found By The Trial Judge

[14] The learned trial judge found that the caption and the words complained of and comprised in the said article bore the following defamatory meanings of the plaintiff:

(i) that the plaintiff was a person whose marriage bond had a price tag and that for a payment of RM3 million she was bought off her marriage vows. (See p. 29 of the record of appeal).

(ii) that the plaintiff was a loose charactered woman with lax morals. (See p. 29 of the record of appeal).

(iii) that the plaintiff bought herself off from her marriage bond by paying her ex-husband RM3 million. (See p. 38 of the record of appeal).

(iv) that it imputed adultery, unchastity or immoral behaviour on the part of the plaintiff. (See pp. 39 and 40 of the record of appeal).

The Defendant's Grounds Of Appeal

Learned counsel for the defendant, Encik Haris Ibrahim in the appeal before us relied essentially on three main grounds which can be summarized as follows:

(i) in concluding that the caption and words complained of and comprised in the said article were defamatory of the plaintiff, the learned trial judge failed to consider the article in its entirety;

(ii) the learned trial judge misapprehended the foundational basis and the circumstances in Syariah law when a divorce by way of "tebus talak" would be available;

(iii) in awarding the plaintiff aggravated damages, the learned trial judge failed properly to consider all of the evidence.

Decision Of The Court On Appeal

[16] At the outset we would state that the test to be applied when considering whether a statement is defamatory of a plaintiff is well settled in that it is an objective one in which it must be given a meaning a reasonable man would understand it and for that purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. *Gatley on Libel & Slander*, 10th edn on this point at pp. 108 and 110 *inter alia* states as follows:

> It is necessary to take into consideration, not only the actual words used, but the context of the words.
>
> It follows from the fact that the context and circumstances of the publication must be taken into account, that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. **This or that sentence may be considered defamatory, but there may be other passages which take away the sting.** (emphasis added).

[17] Still on the same point in the case of *Charleston v. News Group Newspapers Ltd.* [1995] 2 AC 65, Lord Bridge of Harwich in delivering the speech of the House of Lords at p. 70 had quoted this passage as follows:

> ... the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. *In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and the antidote must be taken together.* (emphasis added).

[18] It must be noted in this case that the alleged caption and words complained of and the rest comprised in the said article were written by the reporter (DW1) arising from the two interviews that DW1 had conducted with the plaintiff in September and December 1995. The defendant had caused to be published four issues of the Mingguan Wanita wherein appeared articles of and concerning the plaintiff. In the circumstances of the case therefore due consideration ought to be given to the possibility of errors being made in the manner of reporting resulting in clarification and corrections needed to be made by the parties concerned.

[19] In the present case if we were to peruse the said article as a whole, the so-called third person in the plaintiff's marriage is mentioned twice and the issue of "tebus talak" just once. It is noted that the rest of the article is either neutral in its terms or speaks positively of the plaintiff. The first mention of third person in the plaintiff's marriage is shown in the article as at the last paragraph on p. 16 of the record of appeal which states as follows:

> One such story is that there is a third person in her marriage. This made me quickly contact her. As expected, Normala strenuously denied it and said such happenings were something normal.

[20] The plaintiff's response follows as can be seen at the first and second paragraphs on p. 17 of the record of appeal when she stated the following:

> I do not deny having received phone calls from particular people. I consider it all part of the ups and downs that have to be experienced by someone whose work involves the public. Enticed? No. I am certain that I am strong enough to face it all. In such a situation, I stay firm to my attitude. If a million disappointments befall me and at the same time I am more determined, I feel the disappointments will go away, said Normala sweetly.

[21] The response above was elicited from the plaintiff in the course of the September interview and was confirmed by the plaintiff in her evidence as shown at pp. 128 and 129 of the record of appeal.

[22] The second mention of a third person in the plaintiff's marriage and the only reference to "tebus talak" in the said article can be found at the last paragraph on p. 18 through to the first paragraph on p. 19 of the record of appeal which state as follows:

> More interestingly, apparently there was a third person in her life who was prepared to pay RM3 million to her husband as "tebus talak" (compensation) to divorce her. I was stunned a while and then I heard from a friend that apparently her husband had taken a new wife.

[23] Notwithstanding the above mentioned statement on the plaintiff we find that the paragraph that immediately followed made it plain that there was no suggestion of infidelity whatsoever on the part of the plaintiff when she was described as follows:

> Normala was disappointed because while she avoided temptations, her fidelity has been wasted. Her explanation was too simple. Her husband wanted a full-time housewife.

[24] It is our considered view had the learned trial judge taken into account the entirety of the article, he could not possibly have concluded that the words complained of imputed adultery, unchastity or immoral behaviour on the part of the plaintiff or meant that she was a loose charactered woman with lax morals. We therefore find the learned trial judge had erred when he concluded that the words complained of imputed adultery, unchastity or immoral behaviour on the part of the plaintiff by not giving consideration to the words "Normala was disappointed because while she avoided temptations, her fidelity has been wasted." On this point we would also like to highlight the two questions that were put to the plaintiff in cross-examination and her response as at pp. 152 and 153 of the Record of Appeal reproduced as follows:

> Q. See page 20 (page 176 in CABD).
>
> You said yesterday the heading 'Di sebalik senyuman Normala' carried an unpleasant meaning.
>
> See 2nd column, 4th para (page 20) 'Walau apapun ...,
>
> Isn't that complimentary of you?
>
> A. Yes.
>
> Q. I suggest that the author meant that despite all your sufferings you managed a smile.
>
> A. If they read the whole article, yes. What about if they just read 'Tebus talak 3 juta' and the title 'Di sebalik senyuman Normala?'

[25] It is our finding that the plaintiff herself noted what the learned trial judge had overlooked in that when the article was read as a whole, it was complimentary of the plaintiff and could not have borne the meaning as found by the learned trial judge.

[26] On this first ground of appeal alone as put forward by the defendant we would have allowed this appeal in that the caption and the words complained of as comprised in the said article are not defamatory of the plaintiff.

[27] The second ground of appeal as put forward by the defendant is on the trial judge's misapprehension of the foundational basis and the circumstances in Syariah Law when a divorce by way of 'tebus talak' would be available. Learned counsel for the defendant submitted that the learned trial judge agreed that the words 'tebus talak' and 'orang ketiga' in their normal meaning and context are not defamatory of the plaintiff. The learned trial judge also acknowledged that under Syariah law, divorce by way of 'tebus talak' was afforded to a Muslim wife in the event the husband refused to divorce her. The learned trial judge also accepted that as 'tebus talak' was a legitimate form of divorce provided under Syariah law, the term 'tebus talak' *per se* could not be defamatory. However, learned counsel for the defendant contended that the trial judge was in error when he concluded, from a hadith said to be reported by one Muhammad Ali, that the basis of 'tebus talak' is a tradition of the Prophet (see first para. of p. 32 of the record of appeal). In fact the basis for such a provision as rightly pointed by learned counsel for the defendant is the Holy Qur'an as found in Surah Al Baqarah Verse 229 which provides as follows:

> A divorce is only permissible twice; after that the parties should either hold together on equitable terms or separate with kindness. It is not lawful for you to take back any of your gifts, except when both parties fear that they would be unable to keep the limits ordained by Allah. If you do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah. So do not transgress them. If any do transgress the limits ordained by Allah, such persons wrong (themselves as well as others).

[28] Learned counsel for the defendant further submitted that the learned trial judge then, presumably relying on the hadith and alluding to a supposed view of Professor Ahmad Ibrahim in his

book *"The Administration of Islamic in Malaysia"* concludes that the compensation paid to effect a divorce by 'tebus talak' must emanate out of the estate or property of the wife, and that consequently reference to payment of that compensation by a third party constituted the defamation. (See first paragraph on p. 32 and the first paragraph on p. 33 of the record of appeal).

[29] It is our view a consideration of the foundational verse in the Holy Qu'ran referred to above will demonstrate that no limitation such as postulated by the learned trial judge is to be found therein. The hadith quoted by the learned trial judge also does not stipulate the limitation as postulated by the learned trial judge. A reference to the book *"The Administration of Islamic Law in Malaysia"* by Professor Ahmad Mohamed Ibrahim at pp. 256 to 259 which deals with the matter of divorce by 'tebus talak' would also show nowhere in the commentary is there any support for the limitation as postulated by the learned trial judge. We therefore find the learned trial judge having already found that 'tebus talak' and 'orang ketiga' in their normal meaning and context bear no defamatory meaning of the plaintiff had erred when he made a finding that the blazing headline "Mala tebus talak RM3 juta" was defamatory.

[30] For completeness in our judgment we would also deal with the third and alternative ground of appeal of the defendant wherein it is the contention of the defendant that in awarding the plaintiff aggravated damages the learned trial judge failed properly to consider all of the evidence available. The learned trial judge in this case made an award of aggravated damages, finding the aggravating factors as follows:

(1) the defendant repeated the libel in publications subsequent to the one under complaint;

(2) the repeat of the defamation was solely motivated by a desire to boost sales;

(3) the defendant's apology was a 'half hearted attempt'; and

(4) the words complained of were untrue.

[31] The law governing the award of aggravated damages has been succinctly stated by *Gatley on Libel & Slander*, 10th edn at pp. 243 and 244 wherein it is *inter alia* stated as follows:

A The conduct of the defendant, his conduct of the case, and his state of mind are all matters which the claimant may rely on as aggravating the damages.

... There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's B proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. The conduct of a defendant which may often be regarded as aggravating the injury to the plaintiff's feelings, so as to support a claim for 'aggravated' damages, includes a failure to C make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the claimant from proceeding; persistence, by way of a prolonged or hostile cross-examination of the claimant, or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself in a manner D calculated to attract wide publicity; and persecution of the plaintiff by other means.

[32] The subsequent publication referred to by the learned trial judge were issues No. 642 and 644 of the said magazine E "Mingguan Wanita". The plaintiff's evidence was that subsequent to the publication of issue No. 636, she had contacted DW1 and asked him to do something as what he had published was not true and she asked him to correct it. During cross-examination, the plaintiff confirmed that most of what appeared in issue No. 642 F was a fair reflection of what she said to DW1 in the course of her telephone conversation with him on 9 December 1996. Also in cross-examination, it was put to the plaintiff that in calling DW1, what she sought was to set the facts of her divorce straight. She confirmed this and added that she wanted it stated G that what was published in issue No. 636 was not true. She also agreed that what appeared on p. 21 of issue No. 642 was clearly an admission by the defendant that what was published in issue No. 636 was untrue (See pp. 154 and 155 of the record of appeal).

[33] It is our finding the article appearing at pp. 20 and 21 of H issue No. 642 comprised, in the main, what the plaintiff had narrated to DW1 over the telephone when she had called to ask for the publication of a clarification. There was a brief mention of the 'tebus talak' matter appearing under the heading "RM3 juta tidak benar' and this was necessary to lend context to the I defendant's refutal of the same as utter nonsense. It is also noted that the learned trial judge found as a fact that the plaintiff was dissatisfied with what was published in issue No. 642 and

conveyed this to the defendant. The defendant then proceeded to publish the last article of and concerning the plaintiff in issue No. 644. The article in issue No. 644 appears on pp. 10 and 11 of the magazine. It bears the heading "TEBUS TALAK RM3 JUTA FITNAH!" and contains one paragraph which alludes to the 'tebus talak' rumours. It was followed in the next paragraph with a repeat of the defendant's denial of the same that appeared in issue No. 642. We also find the rest of the article, in the main, carries comments by readers which are complimentary of the plaintiff. Finally, it bears and contains the apology of the defendant.

[34] The learned trial judge in his judgment had categorized the article in the said issue No. 644 as "nothing more than a repetition of the alleged libel" and "a rhetoric repetition of the impugned article." (See p. 26 of the record of appeal). We find the said categorisation by the learned trial judge is inconsistent and at odds with the contents of the article appearing in issue No. 644 as highlighted above.

[35] With regard to the defendant's apology was a "half hearted attempt", the learned trial judge appears to have accepted that the words complained of and comprised in the article turned on rumours that a third person had paid RM3 million to the plaintiff's husband to secure the plaintiff's divorce. On this point it is to be noted that the plaintiff herself was unable to refute that prior to the publication of the article, this rumour had been circulating but complained that after the publication of the article, the rumour was then in print. The article in fact contained the plaintiff's refutal of this rumour. We find the article itself, on the whole, sought to portray the plaintiff as a busy working wife who had attained celebrity status through her work, and yet gave priority to her marriage whilst it subsisted, and held true to her marital vows to the end. The article portrayed her as being strong in the face of adversity. The article further concludes with the writer declaring not to pay any further heed to any rumours about the plaintiff. We therefore find that the article was never intended to be defamatory of the plaintiff.

[36] It is also to be stated here when the plaintiff complained of the article, the story in issue No. 642 appeared. Through one named Anis, the plaintiff communicated that she was not satisfied with what appeared in issue No. 642. Hence the publication of the article in issue No. 644. In both issues No. 642 and 644 the

A plaintiff's castigation of the rumour as nonsense was published. In addition, in issue No. 644, the defendant published under the heading "MOHON MAAF" wherein it was stated that the article was withdrawn and that the defendant regretted the publication of the article and apologized to the plaintiff and her family if its
B publication had caused any confusion or false notions about those involved. The plaintiff confirmed in cross-examination that even though she had asked DW1 *vide* the telephone conversation of 9 February 1996 to publish a clarification, she had not sought to be shown a draft of what was to be published. It is our considered
C view the apology that appeared in issue No. 644 of the magazine met the criteria of a full and frank withdrawal of the charges or suggestions conveyed if any regarding the plaintiff. Further the apology should be regarded as adequate noting that there are expressions of regret by the defendant that such charges or
D suggestions were ever published.

[37] As regards the contention of the plaintiff that the words complained of were untrue, we only need to state that the defendant has never depicted the matter complained of to be true.
E The defendant in its statement of defence has never taken a plea of justification to the matters complained of. Both in the defendant's own evidence-in-chief and in the cross-examination of the witnesses for the plaintiff it has never been suggested that there was any truth to the matter complained of. The untruth of
F the matter complained of ought not to have been a matter to be considered for the matter of aggravated damages.

[38] In conclusion we would state again upon a full and complete reading of the said article, and shorn of the erroneous limitations
G placed on the availability of divorce by 'tebus talak', it is our finding that the meanings of the words complained of as found by the learned trial judge cannot be justified in the circumstances of this case. We therefore allow the defendant's appeal with costs both here and in the court below and set aside the orders made
H by the learned trial judge. It therefore follows that the cross appeal of the plaintiff is hereby dismissed with costs. The deposit in the defendant's appeal is to be refunded to the defendant. The deposit in the plaintiff's appeal is to be paid out to the defendant to account of its taxed costs.

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